a knowledge of the new idea may, in the absence of a statutory patent, use the knowledge as he wishes, even to the extent of reproducing the invention itself.[8] There is no property right in such a conception.[9] Trade secrets are treated the same way, for they are essentially nothing more than plans or schemes. Though equity often enjoins the divulging of them, the reason is always to prevent a breach of trust or confidence, even if the language used appears to indicate a property right in the idea.[10] That there is no such property right is best shown by the fact that if one comes *bona fide* by a knowledge of the secret, he can use it free from interference on the part of the creator.[11]

Thus, running through the law, is a complete denial of any ownership in any intellectual work as such. Once ideas are communicated, they irrevocably become part of the recipient's mental make-up. They are as much his as the originator's. Once knowledge is acquired, the common law acting *in rem* is powerless to take it away. And if no breach of trust or confidence is involved, no reason is seen why such a possessor of ideas may not use them as well as the creator of them. As the right of property connotes the capability of using or disposing of the subject of property to the exclusion of all others,[12] the result follows that there is none in a plan or scheme.[13]

RECENT CASES.

BANKRUPTCY — GROUNDS FOR REFUSING DISCHARGE — OBTAINING PROPERTY BY FALSE STATEMENT IN WRITING. — A bankrupt, three weeks before filing his voluntary petition in bankruptcy, obtained property on credit by means of a fraudulent written statement as to his solvency. The creditor thus defrauded was, however, fully paid before the bankruptcy proceedings. *Held*, that a creditor other than the defrauded person may successfully plead the fraudulent writing in opposition to the bankrupt's discharge, under the amendment of 1903 to § 14 *b* of the Bankruptcy Act of 1898. *In re Harr*, 143 Fed. Rep. 421 (Dist. Ct., E. D. Mo.).

The provision here involved provides that the bankrupt's discharge may be refused if he has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." The ground thus furnished for opposing a bankrupt's discharge is a novelty in bankruptcy laws, but the conclusion reached, that a creditor other than the party defrauded may take advantage of the provision, could not be avoided, except by a wholly unwarranted perversion of the language used in the statute. The present case involves the first decision on the point, though the same question has previously been referred to. See *In re Dresser*, 13 Am. B. Rep. 616.

BANKRUPTCY — PRIORITY OF CLAIMS — PRIORITY OF LIENS OVER WAGE-EARNERS' CLAIMS. — The bankrupt, when solvent, assigned to a bank part of the sum to become due on a paving contract. After bankruptcy several unpaid

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[8] Brown *v.* Duchesne, 19 How. (U. S.) 183. See also Wilson *v.* Rousseau, 4 How. (U. S.) 646.

[9] See Gillet *v.* Bate, 86 N. Y. 87.

[10] Morrison *v.* Moat, 9 Hare 241; Peabody *v.* Norfolk, 98 Mass. 452.

[11] Steward *et al. v.* Hook *et al.*, 118 Ga. 445. See also James *v.* James, L. R. 13 Eq. 421.

[12] See Rigney *v.* City of Chicago, 102 Ill. 64, 77.

[13] See Bristol *v.* Equitable Life Assur. Co., 5 N. Y. Supp. 131, aff. 132 N. Y. 264; Burnell *v.* Chown, 69 Fed. Rep. 993; Simmons Hardware Co. *v.* Waibel, 1 S. D. 488.

laborers claimed payment of their wages. The estate was not sufficient to pay both the laborers and the bank. *Held*, that the bank has an equitable lien on the proceeds of the contract to the extent of the assignment to it, which lien is superior to the labor creditors' right to priority under the National Bankruptcy Act. *In re Cramond*, 145 Fed. Rep. 966 (Dist. Ct., N. D. N. Y.).

As a result of the assignment, the bank acquired a valid equitable lien on the fund arising from the contract. *Peugh* v. *Porter*, 112 U. S. 737. And it is well settled that a trustee in bankruptcy takes the property subject to all liens valid as against the debtor and his creditors. *Hewit* v. *Berlin Machine Works*, 194 U. S. 296. But § 64 *b* of the Bankruptcy Act provides that wages due laborers shall be given a priority against the estate. U. S. COMP. STAT. 1901, p. 3447. On the other hand, however, § 67 *d* states that certain liens, including those like the present, shall not be affected by the Act. U. S. COMP. STAT. 1901, p. 3449. In order to give effect to this later provision it would seem clear that the lien-holders should be paid before the wage-earners are given their priority. Two of the other three cases found on the point are in accord with the present one. *In re Frick*, 1 Am. B. Rep. 719; *In re Kirby-Dennis Co.*, 95 Fed. Rep. 116. In the case *contra* no reason is given for the conclusion. *In re Tebo*, 101 Fed. Rep. 419.

BANKS AND BANKING — DEPOSITS — RIGHTS OF DEPOSITOR UPON SUB-DEPOSIT BY DEPOSITARY BANK. — In order to stifle competition, several banks made an agreement by which bank A submitted the highest bid for county funds and thereby secured the deposit. Following out the agreement, bank A deposited a certain part of the county funds received by it with the other banks, drawing upon them only for their proportionate share of drafts by the county upon bank A. The other banks paid bank A the same rate of interest which A, in accordance with its bid, was paying the county. Bank A failed. *Held*, that the county may recover the sums on deposit in the other banks in preference to the other creditors of Bank A. *In re Salmon*, 145 Fed. Rep. 649 (Dist. Ct., W. D. Mo.). See NOTES, p. 140.

BILLS AND NOTES — CHECKS — NEGLIGENCE OF DRAWER. — An executor drew several checks on the appellant bank, in each instance leaving a space to the left of the amount, and forwarded them to the respondents, his co-executors, who signed them. The first drawer then raised the amounts by filling in the mentioned spaces. The bank, exercising due care, honored the checks for the altered amounts, and the respondents sued the bank. *Held*, that there was no evidence to go to the jury that the respondents violated any duty to the bank, which accordingly is liable for the amount of the forged checks. *Colonial Bank of Australasia* v. *Marshall*, 22 T. L. R. 746 (Jud. Com. P. C., July 27, 1906). See NOTES, p. 139.

BILLS AND NOTES — DOCTRINE OF PRICE *v.* NEAL — DRAWEE'S RIGHT TO RECOVER PAYMENT OF FORGED CHECK. — The defendant caused to be presented to the plaintiff a check purporting to be drawn by A on the plaintiff in favor of B. The check was indorsed by the defendant and the several parties through whose hands it had passed in the usual course. The plaintiff, as did the defendant, believed the check to be genuine, paid it, and charged it to the account of A. Later it was discovered that A's name had been forged, and the plaintiff brought suit to recover back from the defendant the amount of the check so paid. *Held*, that the money, being paid under a mistake of fact, can be recovered back in the absence of proof that the defendant had been misled or prejudiced by the plaintiff's failure to detect the forgery. *First National Bank of Lisbon* v. *Bank of Wyndmere*, 108 N. W. Rep. 546 (N. D.).

This case is contrary to the well-settled doctrine of Price *v.* Neal. For a full discussion of the principles involved, see 4 HARV. L. REV. 297; 16 *ibid.* 514.

CARRIERS — EJECTION OF PASSENGER — PRESENTATION OF WRONG TRANSFER CHECK. — A conductor gave a passenger a wrong transfer check, which the conductor of a second car refused to accept. The passenger was evicted on

failure to pay another fare. *Held*, that the company is liable in damages for the eviction. *Georgia Ry. & Electric Co.* v. *Baker*, 54 S. E. Rep. 639 (Ga.). See NOTES, p. 137.

CARRIERS — LIENS — CONVERSION BY REFUSAL TO DELIVER DAMAGED GOODS WITHOUT PAYMENT OF FREIGHT. — The defendant, a carrier, so negligently delayed the transmission of certain goods consigned to the plaintiff that the damages due to the delay were greater than the amount of the freight charges. Without tendering these charges, the plaintiff demanded the goods, and upon the carrier's refusal to deliver them without payment, brought suit for their value. *Held*, that the plaintiff may recover, because the carrier has been guilty of conversion. *Missouri Pacific Ry. Co.* v. *Peru-Van Zandt Implement Co.*, 85 Pac. Rep. 408 (Kan.).

It has been held for almost half a century that a consignee whose goods have been damaged in transit can offset his claim against the charges for freight. *Gleadell* v. *Thomson*, 56 N. Y. 194. Reasoning from this position, the further decision has been made that, if the damages equal or exceed the amount of the freight, the carrier's lien is destroyed entirely and the consignee may bring replevin. *Bancroft* v. *Peters*, 4 Mich. 619. The result obtained in allowing replevin is highly satisfactory, since it allows the owner the possession and use of his goods, settling at the same time the dispute as to freight and damages. See *Dyer* v. *Grand Trunk Ry. Co.*, 42 Vt. 441. The result in trover is harder for the carrier, for it compels it to pay for the goods and become a retail merchant to prevent loss. See *Miami Powder Co.* v. *Port Royal, etc., Ry. Co.*, 38 S. C. 78. But, granting that replevin lies properly, trover should also logically be allowed; and even from an equitable point of view it is justifiable. It saves the consignee the unnecessary advance of the freight charges, and simply imposes on the carrier the necessity of deciding at its peril whether or not the damage is in excess of the freight, without causing it any loss unless it unwisely asserts the lien.

CARRIERS — STEAMSHIPS — RIGHT OF PASSENGER TO BERTH. — The plaintiff, on buying a ticket for a steamboat journey over-night, asked for a berth. He was told that he must wait until the boat had started. He complied, but was unable to get a berth, and had to sit up all night. Thereupon he brought action. *Held*, that, on this evidence, it is error to grant a nonsuit. *Patterson* v. *Old Dominion S. S. Co.*, 53 S. E. Rep. 224 (N. C.).

Carriers must serve their passengers with adequate facilities for their comfort as well as for their safety. *Fort Worth & D. C. Ry.* v. *Hyatt*, 12 Tex. Civ. App. 435. To the carrier's discretion is left open the whole scope of reasonable facilities; only when affirmatively shown to be unreasonable will the courts interfere. *Gardner* v. *Providence Telephone Co.*, 23 R. I. 312. On voyages of length it seems that a berth must be provided and that custom includes it in the price of transportation. *The Oriflamme*, 3 Saw. (U. S.) 397. As to carriage by water over-night a distinction must be made. Sleeping-quarters involve additional compensation, passengers frequently travel without them and companies habitually oversell their accommodations. In view of these customs a traveler reasonably expects with his passage-ticket only the privilege of buying a berth if he apply in time. Having professed, however, to sell berths, the company should, in reason, provide an appropriate place for their purchase before the passenger has irrevocably committed himself to the journey. *Chicago & Alton Ry.* v. *Flagg*, 43 Ill. 364. Furthermore, silence, as here, when the supply is exhausted would seem to amount to a misrepresentation. The decision may be rested on either of these grounds.

CHINESE EXCLUSION ACTS — EXCLUSION OF CHINAMAN CLAIMING CITIZENSHIP. — *Held*, that a Chinaman within the United States who resists deportation on the ground that he is an American-born citizen, may not be deported until the right of the government to deport him has been judicially reviewed. *Moy Suey* v. *United States*, 33 Nat. Corp. Rep. 40 (C. C. A., Seventh Circ., April, 1906).

The court holds that there is a fundamental distinction between this case and that of a Chinese citizen of the United States who has left the United States and is excluded when he seeks to return. For a discussion of the latter case, see 19 HARV. L. REV. 60.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — ADMINISTRATION OF ESTATE OF LIVING PERSON. — A state statute provided that the orphans' court might, under certain restrictions, judicially determine to be dead any person who had been absent and unheard of for seven years. Under this statute a petition was filed asking that letters of administration be granted upon the estate of such an absentee. The court decreed the absentee judicially dead, and granted the letters as prayed. An appeal was taken. *Held*, that the lower court was without power so to decree, as the statute is null and void under the due process clause of the fourteenth amendment to the Constitution of the United States. *Savings Bank of Baltimore* v. *Weeks*, 64 Atl. Rep. 295 (Md.).

The decision is sustained by authority. For a discussion of a case which involved the interpretation of a similar statute, see 19 HARV. L. REV. 535.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — DELEGATION OF LEGISLATIVE POWERS TO BOARDS OF HEALTH. — An act of assembly provided that the boards of health of boroughs should adopt suitable rules for the registration of plumbers, and that breach of these rules should be a misdemeanor punishable by a fine or imprisonment. Under this act the Board of Health of Dubois provided that every master plumber should register his name and address, and, upon showing certain qualifications described by the board, should receive a license permitting him to work. The defendants were indicted for doing plumbing without a license. *Held*, that the act of assembly is unconstitutional as a delegation of legislative power. *Commonwealth* v. *Shafer*, 37 Pittsb. Leg. J. 71 (Pa., Clearfield Co. Ct., May, 1906).

Except in the case of municipal corporations, the legislature cannot constitutionally delegate its lawmaking power to agents. See *In re Kollock*, 165 U. S. 526. This rather vague rule has been liberally interpreted in favor of boards of health. For example, a statute authorizing measures preventive of smallpox confers constitutional authority upon a board to compel vaccination during an epidemic. *Blue* v. *Beach*, 155 Ind. 121. So a statute giving general sanitary power constitutionally authorizes a board to keep adulterated milk out of a city. *Polinsky* v. *The People*, 73 N. Y. 65. If it were not for this broad interpretation of the courts, public policy might demand an extension of the exceptional legislative privileges of municipal corporations to boards of health. See *Cooper* v. *Schultz*, 32 How. Prac. (N. Y.) 107; 19 HARV. L. REV. 203. The case under consideration follows by analogy a decision in the same jurisdiction, that power to prepare a "standard insurance policy" is legislative and may not be delegated to an insurance commissioner. *O'Neill* v. *The Fire Insurance Co.*, 166 Pa. St. 72. In making this analogy the court attaches importance to the size of the penalty provided by the statute in the present case, but it disregards the significant fact that the agent empowered is a board of health.

CORPORATIONS — STOCKHOLDERS' RIGHTS INCIDENT TO MEMBERSHIP — DISTRIBUTION OF DIVIDENDS IN VIEW OF LIQUIDATION BETWEEN LIFE TENANT AND REMAINDERMAN. — A corporation sold out to a trust and went into liquidation. Part of its assets was retained and turned into cash, which was distributed among the stockholders as a dividend. Both the life tenant and the remainderman of certain stock held in trust claimed this dividend. These assets were admitted on demurrer to represent surplus earnings. *Held*, that the remainderman takes. *Bulkeley* v. *Worthington Ecclesiastical Society*, 63 Atl. Rep. 351 (Conn.).

Whether life tenant or remainderman is entitled to dividends is determined primarily from the testator's intention as revealed in the instrument of trust; this failing, the law provides rules. *Lowry* v. *Farmers' Loan & Trust Co.*,

172 N. Y. 137. The Pennsylvania rule apportions to each party that part of the dividend earned during his term. *Earp's Appeal*, 28 Pa. St. 368. The Massachusetts rule seizes upon the time of declaration as its criterion, and gives to the life tenant all cash dividends declared during his life, no matter when earned. *Minot* v. *Paine*, 99 Mass. 101. Connecticut follows this rule. *Smith* v. *Dana*, 77 Conn. 543. In their desire to formulate a workable rule, of easy application by trustees and courts, the latter courts have laid great stress on the doctrine that dividends are never due until declared. See 16 HARV. L. REV. 54. This reason for the rule logically forbids its application to dividends declared in view of liquidation, for they are not discretionary dispersals of profits, but ministerial distribution of assets. *Gifford* v. *Thompson*, 115 Mass. 478; *Brownell* v. *Anthony*, 189 Mass. 442. The court in the principal case, therefore, properly disregards as immaterial the admission on demurrer that only earnings were represented, and makes the Connecticut law a homogeneous whole. *Cf. Second Universalist Church* v. *Colegreve*, 74 Conn. 79. The rule seems to be the same whether the liquidation be for reorganization, consolidation, or final wind-up. *Clarkson* v. *Clarkson*, 18 Barb. (N. Y.) 646; *In re Armitage*, [1893] 3 Ch. 337. No decision has been noted under the Pennsylvania rule. But see *Simpson* v. *Moore*, 30 Barb. (N. Y.) 637.

CRIMINAL LAW — SPECIFIC INTENT — CRIMINAL RESPONSIBILITY OF DIRECTORS FOR ULTRA VIRES APPLICATION OF FUNDS. — The vice-president of the New York Life Insurance Co., who was also a member of the finance committee, having consented to an *ultra vires* application of the funds of the company, was arrested for statutory larceny. *Habeas corpus* proceedings to the warrant were instituted. *Held*, that there is no evidence disclosed to have justified the magistrate in issuing a warrant. *People ex rel. Perkins* v. *Moss*, 113 N. Y. App. Div. 329.

This decision reverses that of the lower court, commented upon in 19 HARV. L. REV. 611.

DAMAGES — MEASURE OF DAMAGES — RECOVERY FOR DEATH OF WIFE. — The plaintiff placed his mentally unbalanced wife in the hospital of the defendant for treatment. As she needed constant watching, the defendant contracted with the plaintiff to furnish such service. The defendant negligently failed to guard the woman, and in her delirium she threw herself from the window of her room and was killed. The plaintiff brought suit for breach of the contract, asking as damages the value of the services, care, and affection of his wife. *Held*, that the action for the negligent breach of the contract should be *ex delicto* and not *ex contractu*, and that, treating this cause as an action *ex delicto*, damages cannot be recovered at common law for the death of the wife. *Duncan* v. *St. Luke's Hospital*, 113 N. Y. App. Div. 68.

The plaintiff in the present case was clearly entitled to his action *ex contractu*. In all cases where the suit is for a breach of duty stipulated for by contract, express or implied, whether case lies or not, assumpsit does. *Nevin* v. *Pullman Palace Car Co.*, 106 Ill. 222; *Pittsburg* v. *Grier*, 22 Pa. St. 54; *cf. Brown* v. *Boorman*, 11 Cl. & Fin. 44. Yet it may well be that by existing law the plaintiff was entitled to nothing more than nominal damages for the breach of his contract. It is settled that at common law no action *ex delicto* lies for the death of a human being. *Green* v. *Hudson River Rd. Co.*, 28 Barb. (N. Y.) 9; *Major* v. *Burlington R. R.*, 115 Ia. 309. The reason usually given for the doctrine, *actio personalis moritur cum persona*, is undoubtedly good where the plaintiff sues as personal representative; but where he is suing for loss of services, it utterly fails. As the wrong to the plaintiff is quite independent of the wrong to the deceased, the doctrine which denies recovery for loss of services must be regarded as anomalous. See *Osborn* v. *Gillet*, L. R. 8 Exch. 88, 93. Yet the rule being established as to tort cases where the duty violated is imposed by law, there seems to be no logical reason why any different result should obtain where the duty violated is imposed by contract. But as the doctrine is anomalous where the action is for loss of services, the court might well have drawn back in the principal case and awarded the damages sought.

DAMAGES — MEASURE OF DAMAGES — RECOVERY FOR MENTAL SUFFERING NEGLIGENTLY CAUSED. — The plaintiff and her invalid daughter, while passengers on defendant's railroad, were greatly annoyed and frightened as a result of the negligence of its employees, but they received no physical impact of any kind. The employees knew of the relationship between the two. *Held*, that the plaintiff, in addition to damages for physical injury resulting from mental suffering caused by the mistreatment of herself, can recover for her mental suffering caused by the mistreatment of her daughter. *Gulf, C. & S. F. Ry. Co.* v. *Coopwood*, 96 S. W. Rep. 102 (Tex. Civ. App.).

Texas permits recovery for bodily harm due to mental suffering caused negligently without physical impact. *Gulf, etc., Ry. Co.* v. *Hayter*, 93 Tex. 239. When there is a recognized basis for an original recovery, this jurisdiction allows additional damages for mental suffering caused by the negligent act. *Texas, etc., Ry. Co.* v. *Armstrong*, 93 Tex. 31. No fault can be found with the decision on the ground that causal connection was broken, for the defendant's servants, knowing of the relationship between the plaintiff and the invalid, could reasonably have foreseen that mental suffering to the plaintiff would result from their acts. But the court might well have refused to go to such an extreme, on the ground of expediency. This stand has been taken in Minnesota. *Sanderson* v. *Northern Pac. Ry. Co.*, 88 Minn. 162. And the same view had been adopted in a previous Texas case misinterpreted in the present decision. *Pullman Palace Car Co.* v. *Trimble*, 8 Tex. Civ. App. 335. The majority of jurisdictions allow recovery for mental suffering negligently caused only as an additional element of damage when there has been physical impact. *Kennon* v. *Gilmer*, 131 U. S. 22. These jurisdictions, however, almost unanimously deny such recovery for mental suffering due to another's injury. *Cleveland, etc., Ry. Co.* v. *Stewart*, 24 Ind. App. 374. Therefore, generally speaking, the result in the main case would be doubly impossible outside of Texas.

DIVORCE — ALIMONY — RIGHT OF DIVORCED WIFE TO LANDS CONVEYED IN FRAUD OF DOWER AS SECURITY FOR ALIMONY. — A man under engagement to marry made a gratuitous conveyance of land in order that it might not be subject to the dower right of his prospective wife. The grantee knew the object of the conveyance. The marriage took place, and later the wife secured a divorce and alimony. *Held*, that there is a lien on the land conveyed to secure payment of the alimony. *Goff* v. *Goff*, 53 S. E. Rep. 769 (W. Va.).

The weight of authority is that a later creditor may set aside a conveyance in fraud of a prior one. *Claflin* v. *Mess*, 30 N. J. Eq. 211. The obligation of a husband not to make conveyances to defraud his wife of dower is similar to the obligation of a debtor not to defeat his creditors by such conveyances. See *Youngs* v. *Carter*, 10 Hun (N. Y.) 194, 199. When the wife has recovered alimony, she becomes, as to it, a quasi-creditor. See *Bouslough* v. *Bouslough*, 68 Pa. St. 495, 499. Logically, therefore, the divorced wife should be allowed to set aside the conveyance which was in fraud of her own prior right of dower. And even disregarding the creditor analogy, she should be allowed to do so in jurisdictions where alimony is given as a substitute for dower. Probably where alimony is regarded as a mere allowance for support, the result should also be the same, for it is inequitable that the husband should be allowed to profit by a divorce resulting from his own wrongful conduct. The only case found in point with the present is in accord, and seems to be decided on the ground that the conveyance before marriage was in fraud of the wife's marital property rights in general. *Way* v. *Way*, 67 Wis. 662.

EASEMENTS — SEVERANCE AND TRANSFER OF RIGHT — EQUITABLE RIGHTS RESULTING FROM ATTEMPTED RESERVATIONS OF EASEMENTS IN GRANTS OF DOMINANT TENEMENTS. — The plaintiff conveyed land to the defendant "reserving the easements in the street . . . now being used by the New York Elevated Railroad Co." The defendant received compensation from the railroad company for the impairment of the easements. *Held*, that the defendant is liable as trustee for the plaintiff of the sums thus received. *Freund* v. *Biel*, 35 N. Y. L. J. 1567 (N. Y., App Div., July, 1906). See NOTES, p. 136.

EQUITY — JURISDICTION — POWER TO PUNISH MUNICIPAL CORPORATION FOR CONTEMPT. — An injunction having issued against the municipal corporation of Rochester, its officers, agents, and servants, the city violated the injunction. *Held*, that the court may, in its discretion, fine the city for contempt. *Marson* v. *City of Rochester*, 97 N. Y. Supp. 881.

Independently of authority granted by statute, courts of law of superior jurisdiction have inherent power to punish for contempt. *Ex parte Robinson*, 19 Wall. (U. S.) 505. And a similar power resides in courts of equity, which are courts of record of superior jurisdiction. *Cartwright's Case*, 114 Mass. 230. The jurisdiction of equity to enjoin a municipal corporation in a proper case is, moreover, clearly established. *Lumsden* v. *City of Milwaukee*, 8 Wis. 485. Therefore the power to punish the corporation in some manner for contempt would seem to follow of necessity. It is true that an old case lays down that where the injunction is addressed exclusively to the corporation, the city cannot be punished for violations of it by its officers. *Mayor of London* v. *Mayor of Lynn*, 1 H. Bl. 209. But this case turned on the form of the injunction and not on any want of power in the court. See *Davis* v. *Mayor, etc., of N. Y.*, 1 Duer (N. Y.) 451, 484. Further, in the absence of statutory restrictions, the court may, in its discretion, either imprison, fine, or discharge the offender. See *Ex parte Robinson, supra*. Hence it seems clearly within the power of a court of equity to fine a municipal corporation for contempt.

EQUITY — JURISDICTION — RESTRAINT OF POLICE. — *Held*, that an injunction will issue against police remaining indefinitely upon the premises of the plaintiff when irreparable damage is threatened and there is no reasonable ground for even a suspicion that the plaintiff's business is illegal. *Burns* v. *McAdoo*, 113 N. Y. App. Div. 165.

This case distinguishes a recent decision of the New York Court of Appeals, commented upon in 19 HARV. L. REV. 382.

ESTOPPEL — ESTOPPEL IN PAIS — OBJECTION TO COURT'S JURISDICTION. — The relatrix asked to be appointed special administratrix of an estate. The court refused her application and appointed another. *Held*, that, in a review of this order, the relatrix is not estopped from setting up that the court did not have jurisdiction to appoint any one to this office. *State* v. *District Court*, 85 Pac. Rep. 1022 (Mont.).

It is well established that the jurisdiction of courts, being fixed by law, cannot be extended by express acquiescence or request of the parties. *Matter of Will of Walker*, 136 N. Y. 20. Nor can a want of jurisdiction be cured by mere failure to object. *Demilly* v. *Grosenaud*, 201 Ill. 272. Accordingly, it would be highly inconsistent to hold that a jurisdiction not authorized by law could be given by the acts of one party, — the result attained if an estoppel were allowed in the present case. Such estoppel has been allowed in favor of a party who has acted upon the court's ruling. *Carrigan* v. *Drake*, 36 S. C. 354. But the case at hand lacks even this essential element. Yet, in any of these cases, it is difficult to see how a judgment rendered without jurisdiction could be so affected by equitable considerations between the parties as to be cured by an estoppel arising therefrom, since such judgment is void purely as a matter of substantive law. It is on this ground that a void contract is held incurable by estoppel. *National Granite Bank* v. *Tyndale*, 176 Mass. 547; see 19 HARV. L. REV. 454. The case at hand, therefore, seems sound and is supported by the majority of cases actually in point. *Freer* v. *Davis*, 52 W. Va. 1; *contra*, *Lounsbury* v. *Catron*, 8 Neb. 469.

EVIDENCE — DECLARATIONS AS TO PEDIGREE — REQUISITE CONNECTION WITH FAMILY. — In an action of trespass to try title to certain land the plaintiff offered in evidence certain declarations of a deceased person as to pedigree. The plaintiff, as a foundation for the admission of the evidence, showed the declarant to be connected with the plaintiff himself, but did not show him to be connected with the party with whom the plaintiff claimed relationship.

Held, that connection with either family is sufficient to render the declarations admissible. *Overby* v. *Johnston*, 94 S. W. Rep. 131 (Tex. Civ. App.). See NOTES, p. 142.

EVIDENCE — SIMILAR FACTS AND OCCURRENCES — CRIMES OTHER THAN ONE IN ISSUE. — The prisoner was charged with murdering by arsenic poisoning one of her household. Evidence that another of the household had recently died from the same cause was admitted, and the jury instructed to consider it only as evidence that there was arsenic in the house. *Held*, that the evidence is not relevant upon the issue which it was admitted to prove, and that prejudicial error has been committed, even if the evidence be admissible upon other issues. *People* v. *Collins*, 107 N. W. Rep. 1114 (Mich.).

Evidence of other crimes of a prisoner has a natural probative value, but when relevant simply as establishing the bad character of the prisoner, is excluded, as the law excludes character evidence in such cases. But when evidence of other crimes is relevant in any other way upon the issues in the case, there is no reason for its exclusion. See *Blake* v. *Albion, etc., Soc.*, 14 Cox C. C. 246. It is well established that such evidence is admissible upon certain issues, such as motive, intent, and the identity of the person charged; but some tendency has appeared to limit the admission to cases involving these issues. See *People* v. *Molineux*, 168 N. Y. 264. This results from the erroneous idea that admission is an exception to a general rule, while in fact admission is the rule, and exclusion the exception. See 1 WIGMORE, EV., § 216. But in all these cases the relevancy and remoteness of the evidence as regards the issue to prove which it is offered should be closely scrutinized, as here the admission of the evidence, if irrelevant, would greatly prejudice the prisoner. *Commonwealth* v. *Shepard*, 1 Allen (Mass.) 575, 581. The principal case seems to be governed by these considerations, and to attain a satisfactory result upon the question of relevancy.

EXECUTORS AND ADMINISTRATORS — RIGHTS, POWERS, AND DUTIES — RIGHT TO TRUST FUND HELD BY DECEASED EXECUTOR. — A testator directed his executor to invest his personal property and to pay the income therefrom, together with the rents and profits from his real estate, to his children; and, at their death, to turn over the entire property to his grandchildren. Before this trust was executed the executor died. *Held*, that the administrator *de bonis non* is entitled to the trust fund. *In re Sheet's Estate*, 64 Atl. Rep. 413 (Pa.).

It is well settled that an executor may also be a trustee, but his duties in the two capacities are entirely distinct. *Lord Brougham* v. *Lord Poulett* 19 Beav. 119. The logical result of this distinction is that the administrator *de bonis non* should succeed only to the executor's duties as executor, and not to those which the executor was under as trustee. Such is the great weight of authority. *Warfield* v. *Brand's Adm'r*, 13 Bush (Ky.) 77; *contra*, *Mathews, Adm'r*, v. *Meek*, 23 Oh. St. 272. The court in the principal case intimates that it was the testator's intention that this trust should attach to the office of executor, and was to be enforced by any subsequent administrator. If such were the fact, the case might possibly be supported. But there were no particular facts showing that intention, and to find it here would result in making a rule that the trust should be attached to the office, wherever an executor is directed to act as trustee, — a very undesirable result. The opinion fails to cite two well-considered cases in the same jurisdiction, which on practically similar facts adopt no such construction and reach an opposite result. *Ross* v. *Barclay*, 18 Pa. St. 179; *Waters* v. *Margerum*, 60 Pa. St. 39.

GIFTS — GIFTS CAUSA MORTIS — GIFT RETURNED TO DOMINION OF DONOR BEFORE HIS DEATH. — The plaintiff, at the request of the deceased, took a tin box from its place in the closet and brought it to the deceased. The latter took therefrom four bank-books and presented them to the plaintiff as a gift *causa mortis*. The plaintiff put the bank-books back into the tin box, returned it to the closet, locked the door, and put the key back in its usual

place in the deceased's dresser. Nothing was touched until after the donor's death, four days later. *Held*, the facts do not show a gift *causa mortis*. *Parker* v. *Copland*, 64 Atl. Rep. 129 (N. J., Ct. Err. and App.).

In gifts *causa mortis* there must be a delivery which deprives the donor of all control over the subject of the gift. *Baskett* v. *Hassell*, 107 U. S. 602. It is also agreed that, because of the great danger of fraud and perjury, there should be no relaxation of the safeguards thrown around such gifts. See *Hatch* v. *Atkinson*, 56 Me. 324. In the case at hand there had, indeed, been a manual delivery of the gift, but since it was immediately restored to its former position, it cannot be said to have been placed beyond the control of the donor. Further, the fact of the gift here must needs be shown by evidence rather than by possession, which is the very thing that the rule as to delivery is designed to avoid. The decision, therefore, seems eminently sensible, and the few cases in point are in accord. *Bunn* v. *Markham*, 7 Taunt. 223; *Dunbar* v. *Dunbar*, 80 Me. 152.

JUDGES — DISQUALIFICATION — INTERESTED MEMBERS SITTING BUT TAKING NO PART. — Upon an appeal to quarter sessions from an order of justices refusing to renew a license, two of the justices who had been present and had taken part in the licensing meeting whose order was appealed from, sat on either side of the chairman and retired with the other justices when they withdrew to consider their decision, but did not vote or take part in the discussion. *Held*, that the proceedings are thereby invalidated and that the appeal must be reheard. *Rex* v. *Lancashire Justices*, 94 L. T. 481 (Eng., K. B. D, Jan. 12, 1906).

It is of the essence of judicial administration that there should be no appearance or suspicion of bias. *Queen* v. *Justices of Hertfordshire*, 6 Q. B. 753. Reasonable apprehension of bias based on interest is sufficient to disqualify, — as where the justice sitting was a member of the limited class of qualified pilots specially protected by the penal act under which the defendant was being tried. *Queen* v. *Huggins*, [1895] 1 Q. B. 563. But mere possibility of bias, based on the fact that the justice was trustee for a person whose security for a loan might be increased in value by the result of the order, was held not to invalidate. *Queen* v. *Rand*, L. R. 1 Q. B. 230. Nor, in general, will the doctrine of disqualifying interest be pushed to extremes. *Leeson* v. *General Council*, 43 Ch. D. 366. Hence, in the absence of statutory or constitutional provision, the court's assumption in the present case that a judicial officer is *ipso facto* disqualified from passing upon an order participated in by himself in a lower court, is unsound. *Pierce* v. *Delameter*, 1 N. Y. 17. The construction of English judicature refutes this idea. If, however, in this case, under English practice the justices might be liable for costs as nominal respondents on the appeal, the court's assumption is correct. *Queen* v. *Justices of Hertfordshire*, *supra*. But the facts contain no such intimation.

LIBEL AND SLANDER — PRIVILEGED OCCASION — MALICE IN FAIR COMMENT. — The defendant published in *Punch* a criticism of a book written by the plaintiff. The plaintiff brought suit for libel, and sought to introduce extraneous evidence of malice to rebut the defense of fair comment. *Held*, that the evidence is admissible. *Thomas* v. *Bradbury*, *Agnew*, *& Co.*, [1906] 2 K. B. 627.

It is well settled that every author subjects himself to fair comment. See *Sir John Carr* v. *Hood*, 1 Camp. 355 n.; 11 HARV. L. REV. 53. Great severity of criticism is allowed when the personal character of the author is not attacked. *Cherry* v. *Des Moines Leader*, 114 Ia. 298. But no personal attack will be permitted. *Triggs* v. *Sun Printing & Pub. Ass'n*, 179 N. Y. 144. Recently evidence of the writer's state of mind has been admitted as bearing on the fairness of the comment. *Plymouth, etc., Soc.* v. *Traders' Pub. Ass'n*, [1906] 1 K. B. 403. And it has been intimated that evidence of malice might rebut the defense of fair comment when otherwise valid. See *Cherry* v. *Des Moines Leader*, *supra*. But it has been left to the present case, by admitting extrinsic evidence of malice expressly on this ground, to decide the point squarely, and

thus to put fair comment on the same basis as the ordinary conditionally privileged statement. The decision seems correct on the ground that fair comment is a privilege based on public policy. Although it is policy to allow the honest critic the greatest freedom of comment, criticism impelled by malicious motives has no just claim to the privilege.

LIBEL — CRIMINAL LIBEL — CORPORATION AS SUBJECT. — *Held*, that a corporation cannot be the subject of a criminal libel. *Commonwealth* v. *Cochran*, 23 Lanc. L. Rev. 267 (Pa., Ct. Quar. Sess., Lanc. Co., May 26, 1906).

The tendency to cause a disturbance of the peace is generally regarded as the essence of criminal libel. *State* v. *Burnham*, 9 N. H. 34. Though a corporation as a distinct entity would be incapable of a breach of the peace, its members might naturally become aroused, and others might be incited against them as members. It has been held that a corporation may be indicted for libel. *State* v. *Atchison*, 3 Lea (Tenn.) 729. There should be as much reason to anticipate a disturbance of the peace when a corporation is the subject of libelous utterances as when it itself is guilty of them. Taking another point of view, it is recognized that a corporation may be either the subject or responsible author of a civil libel. *So. Hetton Coal Co.* v. *N. E. News Ass'n*, [1894] 1 Q. B. 133; *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423. As libel is a crime at common law, it would seem to follow that a corporation may be the subject of a criminal libel. No cases squarely on the point have been found except in Missouri. That court, with apparent propriety, holds *contra* to the present decision. *State* v. *Boogher*, 3 Mo. App. 442. *Cf. State* v. *Williams*, 85 Pac. Rep. 938 (Kan.).

LICENSES — LICENSOR'S LIABILITY TO LICENSEE — DUTY ON RAILROAD COMPANY OF PREVISION. — A count in a declaration stated that the defendant negligently ran down the plaintiff's intestate, a licensee on its tracks, and that by looking ahead the decedent could have been seen and the accident avoided. *Held*, that the count is demurrable for the reason that the defendant is under no duty of prevision to a bare licensee. *Norfolk & W. Ry. Co.* v. *Stegall's Adm'x*, 54 S. E. Rep. 19 (Va.).

It is settled that the owner is under no liability to a bare, uninvited licensee to keep the premises in a safe condition. But such licensee does not take the risk of the licensor's superadded negligence actively brought to bear upon him, whether by acts of omission or commission. *Davis* v. *Chicago & N. W. Ry. Co.*, 58 Wis. 646. The licensor has even sometimes been held liable for passive negligence if the instrument of the injury was known by him to be dangerous and no warning was given. *Harriman* v. *Pittsburg, C. & St. L. Ry. Co.*, 45 Oh. St. 11. And by the weight of authority a railway company owes a licensee the duty of prevision. *Nuzum* v. *Pittsburg, C. & St. L. Ry. Co.*, 30 W. Va. 228; *contra*, *Baltimore & Ohio Rd. Co.* v. *Schwindling*, 101 Pa. St. 258. It is only reasonable that, so far as is consistent with the railway's paramount duty to protect the lives and property on the train, it should use ordinary care to anticipate and discover that which it has seen fit to permit. Even as to trespassers the same rule applies if their presence can be reasonably anticipated, that is, if it is culpably unknown. *Roth* v. *Union Depot Co.*, 13 Wash. 525. The present case seems to overrule a previous decision in the same jurisdiction, while citing it with approval. *Cf. Williamson* v. *Southern Ry. Co.*, 104 Va. 146.

PAUPERS — SUPPORT, SERVICES, AND EXPENSES — LIABILITY OF PAUPER AND PAUPER'S ESTATE. — A pauper had been maintained by the plaintiffs in accordance with a statutory duty for nearly five years, at an expense of £87 17s. Subsequently the pauper came into possession of a considerable amount of money. *Held*, that plaintiffs may recover from the pauper, on common law principles, the amount expended during the entire period. *Birkenhead Union* v. *Brookes*, 70 J. P. 406 (Eng., K. B. D., May 25, 1906).

The present decision is in harmony with the current of English authority. Prior English cases have allowed recovery from an insane person cared for by local

authorities. *Westham Union* v. *Pearson*, 54 J. P. 645. Reimbursement from an infant pauper subsequently acquiring property has also been permitted. *In re Clabbon*, [1904] 2 Ch. 465. These decisions evidently control the case of an adult sane pauper, since ability to contract in fact, as the court points out, can be no obstacle to the liability presumed by law. American decisions, however, have refused to recognize any common law liability on the part of a pauper subsequently acquiring property. *Charlestown* v. *Hubbard*, 9 N. H. 195. Even where the pauper was possessed of property at the time the expenses were incurred, recovery from him, in the absence of fraud, was refused. *Stow* v. *Sawyer*, 3 Allen (Mass.) 515. The position of the American courts is based on the conception that expenditures for paupers constitute a gift, and therefore do not form a proper basis for the legal implication of liability on quasi-contractual grounds. By statute, however, in America as well as in England, provision is quite commonly made for some recovery from the pauper's property. *Kennebunkport* v. *Smith*, 22 Me. 445.

PHYSICIANS AND SURGEONS — NECESSITY OF PATIENT'S CONSENT TO OPERATION — OPERATION ON MINOR. — A boy seventeen years old consented, with the concurrence of several adult relatives present, to an operation to remove a tumor from his ear. He died under the anæsthetic. His father sued for damages as the personal representative of his deceased son, on the ground that his consent had not been obtained. *Held*, that, in the absence of negligence on the part of the surgeon, he cannot recover. *Bakker* v. *Welsh*, 108 N. W. Rep. 94 (Mich.).

It is conceded law that consent makes a surgical operation lawful. See STEPHEN, DIG. CRIM. LAW, Art. 225. But consent alone is not enough to justify what is clearly an aggravated battery. *Bell* v. *Hansley*, 3 Jones (N. C.) 131. The true justification for such an act must be found in public policy, which demands that a surgeon operate where it is proper for him to do so, though consent will generally be an important or controlling factor in determining the reasonableness of the operation. But the consent to be significant should be given by one of years of discretion. Ordinarily, therefore, the consent of the parent should precede an operation upon a child; but if the child consents, and is, though a minor, in fact of years of discretion, the consent of the parent, especially if other circumstances combine to make action by the surgeon reasonable, should not be essential. The various legal disabilities of an infant have no bearing on his actual discretion in such matters any more than in the case of a married woman, who may by her consent justify a surgeon in operating upon her against her husband's will. *State, use of Janny* v. *Housekeeper*, 70 Md. 162.

RESTRAINT OF TRADE — CONTRACTS NOT TO ENGAGE IN CERTAIN BUSINESS — DIVISIBILITY OF RESTRICTED AREA. — The defendant contracted with the plaintiff not to engage in the plaintiff's line of business "at any place within a radius of thirty miles from either the Townhall at Bournemouth or the Bargate at Southampton." These places being about thirty miles apart, the circles overlapped. *Held*, that the language is not capable of being construed as defining separate areas, and being as a whole unreasonable, the contract is bad. *Hooper & Ashby* v. *Willis*, 94 L. T. R. 624 (Eng., Ct. App., April, 1906).

It is settled that a contract in restraint of trade, unreasonable as a whole, will, if the language permits, be construed as severable and enforced within such smaller defined limits as are reasonable. *Peltz* v. *Eichele*, 62 Mo. 171. If smaller limits are not defined by the contract itself, the court cannot say how much is reasonable restraint and enforce that. *Althen* v. *Vreeland*, 36 Atl. Rep. 479 (N. J. Ch.). The result in the present English case seems wrong. If, because the circles overlap, only one area is defined, then a contract reading "in London or within 600 miles thereof" should be inseparable, since the unreasonable area cannot be wholly rejected while leaving the other entire. But that contract was held separable. *Price* v. *Green*, 16 M. & W. 346. Further, if the contract is to be construed, as it ought, from the language alone, regardless of the geographical position of the circles, the same conclusion should be reached whether the circles intersect or not. To say, as the court intimates, that the word "either"

makes a contract inseparable which, in otherwise similar cases, has always been held separable, is too technical and unreasonable to commend itself. See *Davies* v. *Lowen*, 64 L. T. (N. S.) 655.

STATUTES — INTERPRETATION — CONSTRUCTION OF CONFLICTING CLAUSES. A statute provided in its first section that the term of office of members of the board of county commissioners should be extended to the third Monday in September in order to inaugurate a biennial system of elections. A later section provided that the term of their successors should begin on the first day of December after their election. *Held*, that, since the intent of the legislature, as gathered from the context, is manifestly fulfilled by the first section, the later section will not prevail. *State ex rel. Atty.-Gen.* v. *Mulhern*, 39 Chi. Leg. N. 62 (Oh., Sup. Ct., June 26, 1906).

In construing a statute inconsistent expressions are to be harmonized, if possible, in order to reach the intent of the legislature. *Matter of N. Y. & Brooklyn Bridge*, 72 N. Y. 527. But when two clauses of a statute are irreconcilable the general rule of construction is that the later clause will control. *Harrington* v. *Trustees of Rochester*, 10 Wend. (N. Y.) 547. The reason assigned for this rule is that the case is analogous to that in which the proviso of a statute is inconsistent with the enacting clause, in which instance the proviso is made to control on the ground that it expresses the later intent of the legislature. *Townsend* v. *Brown*, 24 N. J. L. 80. But after all it is largely an arbitrary rule of construction used as a convenient means of settling a difficult question. See *Hall* v. *Equator, etc., Co.*, Fed. Cas. 5931. And although the rule may be of great value when the intent of the legislature is uncertain, it is surely wise to ignore it in cases like the present, in order to allow the earlier clause to prevail when it clearly expresses the legislative intent. *McCormick* v. *Village of West Duluth*, 47 Minn. 272.

STREET RAILWAYS — MUNICIPAL REGULATION AND CONTROL — POWER OF CITY TO FORCE COMPANY TO REPAVE. — A city sued to recover from a street railway company for paving with asphalt the space between the rails and to the limit of the sills. The jury found that the portion of the street used by the company had been out of repair; that reasonable notice had been given it to repair with asphalt, and that that sort of paving was necessary and proper. The pavement had not previously been of asphalt. *Held*, that the duty of the city to pave and repair devolves upon the company, unless expressly withheld, and that the city can recover from the company for the paving. *City of Reading* v. *United Traction Co.*, 64 Atl. Rep. 446 (Pa.).

The duty of a street railway company to pave or repair that part of the street which it occupies is generally settled by statute or the company's charter. When not so provided for, the authorities under the common law agree that the company must restore and keep in good repair that part of the street in which it lays its tracks. *Railway Co.* v. *State*, 87 Tenn. 746. For improvements beyond this, most authorities hold that the company is not liable, for the reason that it would impair the obligation of the franchise contract. *Dean* v. *Patterson*, 67 N. J. L. 199. Since, however, a franchise is a doubtful kind of a contract, perhaps a better reason for this rule is that, the company being only a user of the street for a proper street purpose, it is unjust to impose on it a burden not laid on other users, beyond what is necessary for the proper conduct of its business. Pennsylvania, therefore, seems unwarrantably to extend the liability of a street railway when it allows the city to compel it to pay for changing the character of the roadbed. *Cf. McKeesport* v. *McKeesport Ry.*, 158 Pa. St. 447.

TAXATION — WHERE PROPERTY MAY BE TAXED — TAXABLE SITUS OF TANGIBLE PERSONAL PROPERTY. — The Comptroller of New York assessed all the cars of the relator as "capital employed within that state." The relator offered evidence tending to show that a certain average of the cars was always absent from the state, though it admitted that each specific car might have been in the state at some time during the year; and claimed a deduction for such average. This the defendant refused, and the case came before the Supreme Court on the

ground that the tax was without due process of law. *Held*, that since none of the relator's cars was used exclusively outside the state during the year, the state of New York remains the permanent situs of all the cars, notwithstanding occasional excursions, and hence the tax is proper. *New York ex rel. N. Y. C., etc., R. R. Co.* v. *Miller*, 202 U. S. 584. See NOTES, p. 138.

TELEGRAPH AND TELEPHONE COMPANIES — LEGAL STATUS — SERVICE OF SUBPŒNA BY TELEPHONE. — The criminal code of Texas allowed the sheriff to serve a subpœna by reading it in the hearing of the witness. A witness was called by telephone, his voice recognized, and the subpœna read to him. On his failing to appear, he was committed for contempt, and sued out a writ of *habeas corpus*. *Held*, that service of a subpœna by telephone is invalid. *Ex parte Terrell*, 95 S. W. Rep. 536 (Tex. Crim. App.).

There seems to be no good reason, in most cases, why conversations by telephone should not be treated the same as conversations face to face. They are, in general, equally admissible as evidence. *Mo. Pacific Ry. Co.* v. *Heidenheimer*, 82 Tex. 195. It is common for contracts to be made by telephone, and no objections to their validity are sustained on that ground. See *Wolfe* v. *Mo. Pacific Ry. Co.*, 97 Mo. 473; *cf. Bank of Yolo* v. *Sperry Flour Co.*, 141 Cal. 314. A married woman's acknowledgment by telephone of a deed does not vitiate the deed. *Banning* v. *Banning*, 80 Cal. 271. But special reasons may alter the case. An oath administered by telephone has been held invalid as not the method most binding on the affiant's conscience. *Sullivan* v. *Bank of Flatonia*, 83 S. W. Rep. 421. Both the common and the statute law seem invariably to contemplate that a subpœna should be read in the presence of the witness. In addition, the great risk of mistake in identification, by which the sheriff might endanger the interests of another person who needed the witness, is a strong reason for upholding the rule that the telephone is not available for such service.

TITLE, OWNERSHIP, AND POSSESSION — THINGS SUBJECT TO OWNERSHIP AS PROPERTY — OWNERSHIP IN PLAN. — The plaintiff studied the situation with regard to the white lead industry, and formed the plan of organizing the various companies into one company. He communicated the scheme to the defendant to secure from him funds to finance the project. The defendant promised to afford the necessary aid if his lawyers should approve of the plan. Later, without in any manner co-operating with the plaintiff, the defendant organized the company so projected, using the plan originated by the plaintiff. The latter brought a bill in equity, asking for a discovery and an accounting of the profits made by the defendant in the use of the scheme, and for a decree that the plaintiff was entitled to a share of them. *Held*, that the plaintiff has no property right in the plan, and therefore no right to an account. *Haskins* v. *Ryan*, 64 Atl. Rep. 436 (N. J. Eq.). See NOTES, p. 143.

TORTS — DEFENSES — ASSUMPTION OF RISK BY VOLUNTARY SPECTATOR AT UNLAWFUL EXHIBITION. — The plaintiff was injured at an automobile race held by the defendant under a license from the city of New York. The license being void because of a statute limiting the speed of automobiles, the race was unlawful, though both plaintiff and defendant thought it was lawful. The plaintiff came five miles expressly to see the race. *Held*, that the plaintiff cannot recover on the ground of the unlawfulness of the defendant's act, but can if the injury was caused by its negligence. *Johnson* v. *Automobile Club*, 36 N. Y. L. J. 163 (N. Y., Ct. App., Oct. 2, 1906).

This decision is based upon the maxim, *injuria non fit volenti*; and although it involves rather a novel application of the rule, the court appears to have applied it properly. Because this maxim usually comes up in master and servant cases, some courts hold that it rests upon contract. *St. Louis Cordage Co.* v. *Miller*, 126 Fed. Rep. 495. But its real basis is that the voluntary assumption of the risk by the plaintiff with full knowledge, as in the principal case, disproves the duty. *Thomas* v. *Quartermaine*, 18 Q. B. D. 685. In England and some of the United States it is held that the maxim does not apply where the plaintiff

has a statutory right to protection, but the weight of authority in this country is otherwise. *Knisley* v. *Pratt*, 148 N. Y. 372; *contra*, *Davis Coal Co* v. *Polland*, 158 Ind. 607. And the present case is supported by the only two decisions squarely in point. *Frost* v. *Josselyn*, 180 Mass. 389; *Scanlon* v. *Widgen*, 156 Mass. 462. The case might also have been rested on another ground. The statute involved was designed to protect persons properly on the highway, but not trespassers in adjoining fields who had come to see its provisions broken. There was, therefore, no breach of any duty to the plaintiff. See, in general, 20 HARV. L. REV. 14.

VENDOR AND PURCHASER — RIGHTS AND LIABILITIES — FORFEITURE BY FAILURE TO PAY INSTALMENTS. — The defendant contracted to sell the plaintiff a piece of land, to be paid for partly in cash and partly in monthly instalments. Time was expressly made of the essence, and in case of failure to make any payment as due, all money paid over was to be retained as liquidated damages. It was further provided that in case a suit then pending between the defendant and a third party as to the land in question should terminate in favor of the third party, all payments made by the plaintiff should be returned. Upon the plaintiff's failing to pay three monthly instalments, the defendant declared a forfeiture. Later, the third party won in his suit with the defendant, and the plaintiff brought action for his money. *Held*, that the plaintiff is not entitled to repayment of the instalments paid over. *Jennings* v. *Dexter Horton & Co.*, 86 Pac. Rep. 576 (Wash.).

The failure to pay the instalments was a material breach, which gave the defendant a right to repudiate. *Axford* v. *Thomas*, 160 Pa. St. 8. Where time is made of the essence, payments made by the vendor before forfeiture cannot be recovered. *Maloy* v. *Muir*, 62 Neb. 80; *contra*, *Gilbreth* v. *Grewell*, 13 Ind. 484. Further, forfeiture nullifies the contract and destroys all liability of either party under it. See *Moore* v. *Smith*, 24 Ill. 512. No subsequent happenings can affect the rights of the parties. Nor can any obligation of the defendant to refund the payments in case of an unsuccessful termination of his litigation after the default of the plaintiff, be implied from the contract, which contemplated no such contingency. The case, therefore, seems correct, but it illustrates the hard results that follow from the application of the prevalent rules governing forfeiture in this country.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

POWER OF EQUITY TO RESTRAIN FRAUDULENT ELECTION OFFICIALS. — The case of People *ex rel.* Miller *v.* Tool, decided by the Supreme Court of Colorado in 1904, but only recently reported,[1] held that the state, upon the relation of the Attorney-General, the Governor, and the chairman of the Republican State Committee, could by injunction restrain certain election officials from committing illegal and fraudulent acts, by which they had conspired to steal the forthcoming state election. The defendants' unsuccessful argument against the granting of the injunction rested upon three broad grounds: first, that there was an adequate remedy at law; second, that the question was political and not judicial; third, that equity was asked to restrain a crime. The case has met with so much criticism, from lawyers as well as from partisans, that Mr. Henry J. Hersey, who was of counsel for the petitioners, has attempted in a recent address to defend it. *The Tool Case.*[2]

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[1] 86 Pac. Rep. 224 (Col., Sup. Ct.).

[2] An address by Henry J. Hersey, of Denver, Colorado, before the Colorado Bar Association at its annual meeting, Sept. 27 and 28, 1906.